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83-1905

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
NELSON DECKELBAUM
DECKELBAUM, WOLPERT & OGENS, CHTD.
1140 Connecticut Ave., N.W.
Suite 703
Washington, D.C. 20036

A. DOUGLAS MELAMED
JUANITA A. CROWLEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

JEROME S. WAGSHAL
JEROME S. WAGSHAL, P.C.
3256 N Street, N.W.
Washington, D.C. 20007
(202) 338-2121
Counsel for Petitioners

May 21, 1984

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*,

No. 82-2330

WILLIAMSBURG WAX MUSEUM, INC.,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*,

No. 82-2337

NATIONAL CIVIL WAR WAX MUSEUM,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*

No. 83-1268

NATIONAL CIVIL WAR WAX MUSEUM,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*

No. 83-1269

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

No. 83-1270

WILLIAMSBURG WAX MUSEUM, INC.,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 77-01243, 77-00093 & 77-00131)

Argued December 14, 1983

Decided February 10, 1984

Jerome S. Wagshal with whom *Nelson Deckelbaum* was on the brief, for appellants.

David J. Cynamon with whom *James C. McKay* was on the brief, for appellees.

Before: TAMM and WALD, *Circuit Judges*, and HENLEY,* *Senior Circuit Judge*, United States Court of Appeals for the Eighth Circuit.

Opinion for the Court filed by *Circuit Judge* WALD.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

WALD, *Circuit Judge*: These appeals spring from a series of pre-trial rulings by the district court in three consolidated antitrust cases involving wax museums; the effect of these rulings is to deny all relief on the claims filed. Plaintiff-appellants are commonly owned corporations which operate wax museums in Williamsburg, Virginia, Gatlinburg, Tennessee, and Gettysburg, Pennsylvania. Between 1962 and 1967, all three appellants entered into agreements to purchase or lease display figures for their museums from appellees and to become appellees' "franchisees". In 1977, the appellants filed antitrust claims alleging that the appellees illegally tied the franchise arrangements to the initial sale or lease of the wax figures. Appellants National Souvenir Center, Inc. and Historic Reviews, Inc., which jointly run the Gatlinburg museum, also claimed that appellees unlawfully exercised their monopoly power in the wax figure market to require leasing rather than selling the figures. Upon filing suit, all appellants stopped paying the franchise fees and rents required by the allegedly illegal agreements. Appellees then counterclaimed for recovery of overdue payments and interest.

The district court made several rulings relevant to the issues involved in this appeal. It first denied appellants' motion that appellees' attorneys be disqualified because they had previously represented one plaintiff in matters allegedly related to negotiation of one of the agreements at issue here. It then denied appellees' motion for summary judgment based on their claim that the antitrust charges were patently insubstantial, but granted them summary judgment on their contract counterclaims, awarding them the overdue franchise and lease fees, prejudgment interest on those fees, and ordering the appellants to pay all future franchise fees as they become due. Finally, the court granted summary judgment for the appellees on the ground that the antitrust claims were barred by the statute of limitations. The appel-

lants appeal all adverse rulings including the remedial order requiring them to pay overdue franchise fees with interest and all future fees as they become due.

We affirm the dismissal of the appellants' tying claims on statute of limitations grounds. We find, however, that the statute of limitations is not a proper ground for dismissing the Gatlinburg appellants' monopoly leasing claim. Although we do not wholly agree with the district court's analysis of the applicability of the appellants' antitrust defenses to appellees' counterclaims for overdue franchise fees and lease payments, we agree with the court that those defenses may not be raised, given the facts of these cases. Therefore, we affirm the award of past due franchise and lease payments. We do not find, however, that the district court sufficiently justified its order requiring appellants to pay future franchise fees as they become due. The result is a remand for further proceedings on the Gatlinburg monopoly leasing claim and of the order to make future payments.

I. BACKGROUND

A. *The Franchise Relationship*

This lawsuit was spawned in January, 1957, when Frank Dennis incorporated appellee Historic Figures, Inc. (Historic) to operate a wax museum in Washington, D.C. The display figures in the museum were provided by appellee Lynch Display Corporation (Lynch), a company formed by appellee Earl Dorfman in March, 1957, to manufacture such figures. The figures were made of a vinyl plastic material rather than the traditional beeswax and, according to the appellants, "were considered a substantial improvement over the true wax figures." Brief for Appellants at 15. Lynch agreed to provide the figures for the Washington museum and to assist in installing them in appropriate historical settings. In return, Historic agreed to purchase figures exclusively from Lynch

and, for a five year period, to act as Lynch's sales agent to other wax museums.[1]

Historic soon expanded its business to "franchising" museums in different parts of the United States. The first franchise was granted by Historic's subsidiary National Historical Museums, Inc. (NHM), in 1960, to appellant-National Civil War Wax Museum (Gettysburg), which was owned primarily by Chaim Uberman. According to Dennis's affidavit accompanying appellees' first motion for summary judgment, the agreement between NHM and Gettysburg obligated NHM to provide Lynch figures at cost, and to "furnish, at Gettysburg's request, services 'in connection with the establishment of a museum by franchisee' including historical research for the figures and display scenes, advice on the cast of characters, and story line, assistance in planning floor layouts and advice on promotional material and operating procedures." Brief for Appellees at 9. The appellants contend, however, that NHM also was obligated to "provide continuing franchisor services to its franchisees in the form of assistance in the efficient operations of the museum" throughout the twenty year franchise relationship. Brief for Appellant at 21. In return, Gettysburg agreed to pay NHM 5% of its annual gross receipts for twenty years, beginning in April, 1962, when the museum opened.

In May, 1962, NHM entered a similar agreement with appellant Historic Reviews, Inc. (Gatlinburg). NHM agreed to provide essentially the same service as it provided Gettysburg in return for 5% of Gatlinburg's gross receipts for the nineteen year four month term of the agreement. Unlike Gettysburg, Gatlinburg did not purchase the display figures from Historic, but rather leased them directly from Lynch for the term of the agreement for an annual minimum rent plus 15% of gross annual

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[1] Historic entered subsequent agreements, after expiration of the initial five year term, which obligated Lynch to provide figures for museums which Historic had franchised.

receipts over $100,000. NHM also agreed not to grant another wax museum franchise within 200 miles of Gatlinburg during the term of the agreement.[2]

Uberman established a third franchised wax museum in Williamsburg, Virginia. NHM and appellant Williamsburg Wax Museum, Inc. (Williamsburg) entered a franchise agreement on September 22, 1967. NHM obligated itself to provide the same services as for Gettysburg and Gatlinburg, and not to franchise another wax museum within 100 miles of Williamsburg. In return, Williamsburg agreed to pay NHM 5% of its gross receipts for twenty years, and 2½% of gross receipts thereafter.

The agreements are not typical franchises. *See* Brief for Appellants at 20; Brief for Appellees at 12-13. As the district court recognized:

> [T]he characteristics that generally typify a franchise are not present here: there is no operation under a common name or designation, no cooperative advertising, no periodic inspections, and no establishment of common standards or business practice.

Williamsburg Wax Museum, Inc. v. *Historic Figures, Inc.*, Civ. No. 77-0093, slip op. at 3 n.5 (May 19, 1981) (Memorandum Order granting defendants' motion for summary judgment on their counterclaims, but denying summary judgment for defendants on plaintiffs' antitrust claims). Indeed, precisely what NHM provided in return for the "franchise fee" is a critical issue in the case. Appellees characterize the franchise agreements as

> intended to get the museums off the ground by providing experienced assistance "in connection with the establishment of a wax museum" and by offering Dorfman's consultant services to the franchisees for this purpose only for the period prior to and during

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[2] At the time the franchise agreement was executed, Gatlinburg was owned by a Tennessee entrepreneur, Shelby Boyd. However, in 1964, he sold it to Uberman's company

> the opening of each museum. . . . Therefore, . . . NHM and Dorfman were obligated during the terms of the agreements "to stand by" to provide additional services as requested and paid for by the franchisees (and with respect to Gatlinburg and Williamsburg, also were under a continuing obligation not to establish competing wax museums in specified geographical areas) but the franchisees were under no obligation either to request or pay for such additional services.

Brief for Appellees at 13. The appellants' interpretation of the agreements, on the other hand, is quite different. They claim that "actual services, not merely a standby commitment, were due from the defendants for the franchise fee payments, but that the defendants generally failed to honor this obligation." Brief for Appellants at 20. The record, however, shows no particular instance where NHM provided additional services, beyond start-up services, except for an additional charge.

B. *The District Court Rulings*

The district court first considered appellants' motion to disqualify defendants' counsel, Covington & Burling (C&B), on the ground that it has previously counselled one appellee, Gettysburg, regarding the franchise agreement involved in this suit. *Williamsburg*, slip op. at 4 (Nov. 26, 1980) (Memorandum). The district court's inquiry focused on whether "there is a substantial relationship between the present litigation [involving the franchise agreements] and the matters on which C&B previously provided advice to Gettysburg." *Id.* at 4. After examining the record before it, the court denied appellants' motion to disqualify C&B on the ground that "there is not the slightest evidence or even suggestion in all these materials that C&B advised Gettysburg with respect to the franchise agreement." *Id.* at 7.

The district court next turned down appellees' motion for summary judgment on appellants' antitrust claims.

It noted that the elements of a *per se* tying violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, are

> (1) that the challenged arrangement is in fact a tying arrangement, (2) that the seller has sufficient economic power with respect to the tying product, and (3) that a "not insubstantial" amount of interstate commerce in the tied product is affected.

Williamsburg, slip op. at 5-6 (May 19, 1981) (Memorandum Order). It found there were genuine issues of material fact on all three elements. First, it rejected appellees' "attempts to analogize these cases to traditional franchise cases" involving a single product or products that go "hand-in-hand with [each] other," *id.* at 7 n.10, observing that whether the "franchise" and figures were so related that they constituted a single product was a genuinely disputed issue of fact. Second, it was not able to find that the Lynch display figures were "not sufficiently unique" or that "satisfactory substitutes were available," and that therefore appellees did not have a monopoly in the tying product market. Finally, it could not conclude that the franchise fees NHM collects affected only an "insubstantial" amount of interstate commerce. On the basis of such factual disputes, the district court declined to rule that appellants' *per se* tying claim was invalid as a matter of law.

The district court, however, did grant summary judgment for appellees on their counterclaims. It initially interpreted *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *rev'd*, 455 U.S. 72 (1982), to preclude a defense to a contract action in a case such as this based on the illegality of the contract under the antitrust laws, because the illegality defense was limited to situations where "enforcement . . . would make the court a party to the illegality." *Williamsburg*, slip op. at 10 (May 19, 1981) (Memorandum Order). After the Supreme Court re-

versed this court's ruling in *Kaiser*, 455 U.S. 72, it reconsidered, but concluded, once again, that as long as "the promise being sued on is not itself illegal under the antitrust laws," *Kaiser* did not require recognition of the defense. *Williamsburg*, slip op. at 2 (Sept. 3, 1982) (Memorandum). The promise to pay being sued on in this case was not itself illegal, the district court said, since any antitrust damages in this case "would not necessarily include a recovery of the fees paid by plaintiff under the contract." *Id.* at 3. It thus refused to vacate the grant of summary judgment for appellees. Subsequently, the district court ordered that appellants pay all overdue charges due under the agreement, plus prejudgment interest on them, *Williamsburg* (Nov. 4, 1982) (Order adopting plans for stay of final judgment entered September 3, 1982), as well as all future charges as they become due.

The district court finally dismissed appellants' antitrust claims-in-chief as barred by the Clayton Act's four year statute of limitation, 15 U.S.C. § 15b. *See Williamsburg*, 554 F. Supp. 182 (D.D.C. 1982) (dismissing tying claims); *National Souvenir Center, Inc.* v. *Historic Figures, Inc.*, Civ. No. 77-1243 (Jan. 31, 1983) (Memorandum dismissing suit based on unlawful use of monopoly power). It reasoned that since the agreements were executed well over four years before appellants filed suit, they were barred unless appellees committed new "overt acts" within the limitations period which caused antitrust injury. Finding none, the court dismissed the suits.

Appellants appeal from all the adverse rulings of the district court. In addition, they also ask us, in remanding, to reverse the district court's consolidation of these three cases, claiming that such consolidation may create confusion for a jury. We turn now to consider the merits of these appeals.

II. The Statute of Limitations

Appellants brought their antitrust claims under the treble damage provision of the Clayton Act, 15 U.S.C. § 15. Section 4B of that Act provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

15 U.S.C. § 15b. The primary question in this appeal is when the appellants' cause of action "accrued."

We assume for purposes of this issue, as the district court did, that appellants' complaints state a valid cause of action. It follows, then, that appellants could have raised their antitrust claim as soon as the allegedly unlawful agreements were executed and they suffered harm therefrom. But this does not mean their cause of action necessarily "accrued" only at that time. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968), the Supreme Court held that although an unlawful lease-only policy first affected the plaintiff in 1912, a suit instituted in 1955 was not barred by Pennsylvania's six year statute of limitations, since the lease-only policy was "conduct which constituted a continuing violation of the Sherman Act . . . [and] inflicted continuing and accumulating harm on Hanover." *Id.* The "continuing violation" exception to the rule that the action accrues at the time the initial violation first injures the plaintiff was further delineated by the Court in *Zenith Radio Corp.* v. *Hazeltine, Inc.*, 401 U.S. 321, which stated:

> [i]n the context of a conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id. at 338. Under *Zenith* and *Hanover Shoe*, then, any act within the limitation period that effectuates an antitrust injury pursuant to the conspiracy [or in this case the agreement] gives rise to an action for damages. For their action to survive, plaintiff-appellants had to show an "overt act" pursuant to the original tying arrangement by the appellees within the limitation period which caused them an antitrust injury. *See Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1055-56 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983); *Electroglas, Inc.* v. *Dynatex Corp.*, 497 F. Supp. 97, 105 (N.D. Cal. 1980).

In the case of a genuine tying arrangement, the "overt act" requirement may be satisfied merely by the parties continuing to maintain contractual relationships that directly affect competition in the tied product market. *See, e.g., Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975); *Electroglas*, 497 F. Supp. at 105; *Aamco Automatic Transmissions, Inc.* v. *Tayloe*, 407 F. Supp. 430 (E.D. Pa. 1976); *Material Handling Industries, Inc.* v. *Eaton Corp.*, 391 F. Supp. 977, 980 (E.D. Va. 1975). This is because the evil of a tying arrangement is that it allows a seller who has monopoly power in the tying product market to use it as leverage to gain a share of the tied product market. *See Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 498 (1969); *Northern Pacific Rail Co.* v. *United States*, 356 U.S. 1, 5-6 (1958). In so doing, the monopolist forecloses the share of the secondary market involved in the tying arrangement from competitors, and in addition is able to charge more for the tied product than the purchaser would have paid absent this leverage. Tying arrangements, even if not strictly enforced, "are binding obligations held over the heads of vendees which deny defendants' competitors access to the fenced-off market on the same terms as the defendant." *Northern Pacific*, 356 U.S. at 12. They effectively transfer the seller's monopoly leverage in the tying market

to contractual obligations in the tied market. The critical issue thus becomes whether the agreements, or appellees' actions pursuant thereto, obligated appellants to deal only with appellees or otherwise discouraged appellants from turning to other suppliers in the tied product market within the statute of limitations period.

To make this determination, we have first to identify the "tied product". At oral argument appellees' counsel characterized it as "the franchise." As best we can fathom, he meant the long-term association with NHM along with the start-up advice and stand-by availability that was sold to appellants at the time the agreements were executed. The appellants, on the other hand, specifically alleged that the tie-in was of promotion, advertising and other services related to museum operations which appellees were obligated to provide appellants in payment for their franchise fees. If the appellees are correct, then performance of the agreement, even if it involved an initial tie-in, would have no anticompetitive effect on the market thereafter and so would not survive the statute of limitations bar.

The district court, in granting summary judgment for appellees, found in favor of their contention that the agreements did not call for the appellees to provide promotional, advertising or other operation-related services during the limitation period in return for the franchise fees. The district court, however, apparently did not review the record to ensure that this was not a disputed issue. Instead it asserted that, "[i]t is the law of these cases that the parties intended any post start-up services to be paid for separately, over and above the ongoing franchise fees" relying on its statement in an earlier Memorandum Order of May 19, 1981, that

> [u]nder the "franchise" agreements, defendants were obligated to provide various start-up services or products, and they agreed to "make themselves available" to provide further services at additional

cost, in exchange for a fee of five percent of the franchisee's annual gross receipts.

Williamsburg (Memorandum Order granting summary judgment in part and denying it in part).[3]

In the proceedings leading to the order of May 19, 1981, however, the parties did not litigate whether the tied product was start-up services and a standby commitment, or provision of promotions and advertising without further costs throughout the term of the agreement. For the appellants to survive summary judgment on the viability of their antitrust claims, they had to show only that there were factual issues about whether there was *a* separate product that was tied to the purchase of the museum figures, and whether appellees had a monopoly on those figures. Because the factual issue of whether the tied product was to be provided throughout the term of the agreement as opposed to at the beginning only was immaterial to the court's disposition in its May 19th order, the law of the case doctrine does not apply. *See Russell* v. *Commissioner of Internal Revenue*, 678 F.2d 782, 784-85 (9th Cir. 1982) (dictum in prior decision "is not part of the law of the case"). However, we affirm the district court on a different basis. We conclude that the record before the court on the summary judgment motion does not support the appellants' contention that there is a genuine issue of fact regarding the appellees' obligations to provide continuing services for the basic franchise fee throughout the term of the agree-

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[3] Of course, this court is not precluded from considering an issue that the lower court found to be the law of the case. *See* 18 Federal Practice and Procedure, Wright, Miller & Cooper § 4478 (1981). "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. United States Smelting Refining and Mining Co., 339 U.S. 186, 198-99 (1950).

ments.[4] Hence, the district court's critical assumption that the agreements did not so provide was valid.

Turning to the record on the scope of the agreements, we look first and foremost at the terms of the franchise agreements themselves. Appellants contend that each agreement "on its face" obligates the appellees to provide continuing services for the basic franchise fee. *See* Reply Brief for Appellants at 8. We do not agree. The Gettysburg agreement, which is typical of all three agreements, provides:

> [NHM] will advise FRANCHISEE regarding the scenes and figures to be displayed in FRANCHISEE's museum, the selection of a museum site, the layout designs, and other similar problems which may arise in connection with the establishment of a museum by FRANCHISEE. [NHM] will also advise FRANCHISEE regarding administrative procedures for the efficient operation of FRANCHISEE's museum, including accounting procedures, turnstile and ticket operations, building maintenance, and promotion and advertising techniques. In connection with such advice, [NHM] will make available to FRANCHISEE the services of a qualified individual for two consultation periods, not to exceed one week each in duration at FRANCHISEE's request during the period ending 30th day of SEPTEMBER, 1962. . . .

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[4] The appellants explicitly stated below, at the time they argued against the appellees' motion for summary judgment on the statute of limitations, that this factual issue was in dispute. *See* Volume 3 of the Supplemental Record Excerpts [henceforth cited as SRE]. But mere assertions of facts in pleadings and affidavits, when unsupported by any evidence, are not necessarily sufficient to preclude summary judgment. *See* Exxon Corp. v. Federal Trade Commission, 663 F.2d 120, 128 (D.C. Cir. 1980) (purely speculative issues of fact need not be preserved for trial); Pignous S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482 (1st Cir. 1981) ("factual dispute is . . . genuine if manifested by 'substantial' evidence going beyond allegations of the complaint").

> In consideration of the unique figures and the services to be furnished by [NHM], FRANCHISEE agrees to pay to [NHM] for a period of Twenty (20) years following the date of the opening to the public of FRANCHISEE's museum an amount equal to Five per cent (5%) of the gross admission income received by FRANCHISEE from the operation of its museum.

This key passage from the agreement indicates to us that NHM did not obligate itself to provide continuing services over the years as the franchise agent. It provides for *advice* relating to the "*establishment* of a museum" and "*administrative procedures* for the efficient operation" including advice on "promotion and advertising *techniques*." (Emphasis supplied). It also sets out the extent of the services to be rendered "in connection with such advice," *i.e.*, it was not to exceed two weeks of consultation during the period ending September 30, 1962. Although there is no set term for the franchise itself, the agreement requires Gettysburg to pay a fee for twenty years. It seems clear that most of this fee is an extended payment for the Lynch figures. Only a tortuously strained interpretation of this language supports appellants' contentions that NHM was obligated to provide, as well, an undefined and openended amount of promotion, advertising and other museum services throughout the twenty year period without further pay.

Appellants point, additionally, to the affidavit of Saul Eric Uberman, to demonstrate appellees' continuing obligation to provide services. But Saul Uberman, the son of Chaim Uberman and vice president of C.M. Elberman Enterprises, Inc., the corporate successor of the appellants, was not involved in negotiating any of these agreements. Beyond the assertion that "it was never the understanding of either Frank Dennis nor of Earl Dorfman that the franchisor's obligations under the three franchise agreements were limited to merely a stand-by

commitment,"[5] 3 SRE at 690, his affidavit suggests that certain meetings and telephone contacts between appellants and appellees that cannot be tied to additional fee payments *might be* evidence of provision of additional services under the agreements.[6] *Id.* at 610. This obviously is pure speculation. The affidavit concludes by noting that Saul Uberman had requested services from Frank Dennis and Earl Dorfman on several occasions, but that they did not comply with these requests. Appellants place great significance on the fact that neither Dennis nor Dorfman ever stated in reply to these requests that the services would not be provided because they had to be paid for separately. *See id.* at 611. This second negative inference, however, is as speculative as the first.

Reviewing the record as a whole, we find most striking the appellants' inability to point to a single concrete instance before suit was filed when appellees either provided services within the limitations period for no additional fee, or appellants complained that the lack of such free services breached the agreements. In the end, we simply find these bits and pieces and the *reasonable* inferences drawn from them, even when viewed in the light most favorable to appellants, insufficient to raise a genuine issue of material fact as to whether the agreements obligated the appellees to provide advertising and promo-

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[5] This is the type of assertion without supporting justification that we must consign to the category of conclusory statements that will not defeat a grant of summary judgment. *See, e.g.*, Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1117 (5th Cir. 1979); *see also* Habib v. Raytheon Co., 616 F.2d 1204, 1211 (D.C. Cir. 1980) (holding such statements created genuine issue of fact only because matters involved were by nature "shrouded in secrecy").

[6] Appellants point to no evidence that these contacts in fact involved services provided without fee. In contrast, appellees cite several specific instances where services were provided for additional charges. *See* Brief for Appellees at 12 & n.1.

tional services on a continual basis over the life of the franchise without additional compensation.

After concluding that the tied product was only initial start-up services, the district court inquired into the agreement's ongoing anticompetitive effects and determined that the appellants suffered "only pecuniary and not antitrust harm within the limitations period." *Williamsburg*, 554 F. Supp. at 184. We agree with the district court that mere receipt of payments under an agreement that at some time had anticompetitive effects on the tied product market but no longer has such effects, does not cause "antitrust harm," and does not constitute a continuing antitrust violation. As the district court pointed out,

> [i]f the law were otherwise, the statute of limitations would have little force whenever a contract allegedly executed in violation of the antitrust laws provided for long term payments: there would be no repose until four years after the last installment payment.

Williamsburg, 554 F. Supp. at 184. We also agree with the district court that appellees' commitment to stand by and provide services at fair market value would not seem in any way to discourage the appellants from purchasing the allegedly tied services from other sellers of comparable services, and so would not inhibit competition in the tied market. Because no "overt act" in the four years preceding appellants' suit had any effect on the market, we affirm the district court's grant of summary judgment as to the tying claims on statute of limitation grounds.

We do not agree, however, with the district court's subsequent dismissal on statute of limitations grounds of Gatlinburg's claim that it was forced to lease the Lynch figures as part of appellees' conspiracy to monopolize the wax museum display figure market. *See National Souvenir Center, Inc.* (Jan. 31, 1983) (Memorandum granting

appellees summary judgment on monopolization claims based on Gatlinburg lease on statute of limitations grounds). Appellants alleged that the Gatlinburg lease, like the leases found illegal in *Hanover Shoe*, 392 U.S. at 486 n.3, perpetuated appellees' monopoly power in the wax figure market. *See* Brief for Appellants at 54. They say that the required lease discouraged them from exercising "independent judgment" about whether to dispose of the Lynch figures and replace them with competitors' products at any time in the future and so reinforced appellants long-term monopoly position. *See* Brief for Appellants at 53-54; *cf. Hanover Shoe* 392 U.S. at 507 (appendix to opinion of the court). We admit to extreme skepticism about the substantive validity of this monopoly lease claim based on maintenance of a single lease by an alleged monopolist.[7] We are aware of no case recognizing such a claim. Appellees' sale of the Lynch figures to other wax museum franchisees seriously undercuts appellants' arguments that appellees relied on the *lease as a mechanism* to discourage replacement of the figures with those of competitors during the lease term, or that leasing rather than selling significantly affected the market for figures.[8] Nonetheless, we are not asked here to review the

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[7] As we and the district court read Gatlinburg's monopolization claim, it does not hinge on restrictions attached to the lease but on the mere fact that the figures were leased rather than sold. *See National Souvenir Center*, slip op. at 4 (Jan. 31, 1983) (Memorandum). Even if appellants do contend that the lease contains unlawful restrictive conditions, we suspect that they will have difficulty demonstrating that the conditions in the single lease had either sufficient anticompetitive effects or sufficiently evidenced appellees' alleged anticompetitive motivation to violate the "rule of reason" applicable to such a claim. *See* Genovese Drug Stores, Inc. v. Becrose Associates, 563 F. Supp. 1299, 1305 (D. Conn. 1983); Net Realty Holding Trust v. Franconia Properties, Inc., 544 F. Supp. 759 (E.D. Va. 1982).

[8] Gatlinburg points out that the sale of figures by appellees to other museums was accompanied by resale restrictions. This bolsters its argument that the lease was imposed as a device to preclude

substantive validity of Gatlinburg's claim, only the propriety of its dismissal on statute of limitations grounds.

Our test for determining when an antitrust cause of action stops "accruing" requires us to look at when the challenged contract—in this case the lease—ceases to obligate conduct that has anticompetitive effects. Requiring appellants to continue paying rent for the Lynch figures meant they could not resell the figures or replace them throughout the duration of the lease without severe economic losses; it had as much effect in the market for the figures in 1977 as it did in 1962. Because of this continuing allegedly "anticompetitive" effect of the lease, the statute of limitations is not a proper ground for dismissing the monopolization claims stemming therefrom. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F. Supp. 258, 296 (M.D. Pa. 1965) ("recovery for payments made [within the limitations period] pursuant to leases executed prior to that [period] is not barred by the . . . statute of limitations"), *vacated and remanded on other grounds*, 377 F.2d 776 (3d Cir. 1967),

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a secondhand market in Lynch figures. This argument, relying on resale restrictions, however, was first raised on appeal. *See, e.g., National Souvenir Center*, Complaint ¶ 22 (filed July 15, 1977) (alleging only that compelled lease led to appellants paying "exhorbitant and unconscionable" rate); *id.*, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 31-32 (filed Jan. 19, 1981) (no mention of resale of figures in argument on leases); *id.*, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment With Respect to the Gatlinburg Lease Agreement (particularly discussing anticompetitive effect of lease as allowing appellees to monopolize market for repair of figures; never mentioning secondhand market or resale restrictions in other agreements). We leave it to the district court, which is more familiar with the history of the proceedings in this case and the evolution of Gatlinburg's exact contentions, to decide if this claim is sufficiently related to Gatlinburg's original complaint—that the lease precluded "independent judgment" whether to replace the Lynch figures with others—so that Gatlinburg may raise the claim on remand at this late date.

aff'd in relevant part, rev'd in part and remanded, 392 U.S. 481 (1968).

III. ANTITRUST DEFENSES TO CONTRACT COUNTERCLAIMS

Appellants also assail the district court's grant of summary judgment on the appellees' claims for overdue franchise and lease payments. They claim that the judgment requires a federal court to enforce an illegal contract and that result is contrary to the rule governing antitrust defenses recently laid down in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982). The district court read *Mullins* as allowing antitrust defenses to contract suits only where "the promise being sued on is itself illegal" under the antitrust laws. It characterized the promise appellees sued on as one "for monies for goods or services furnished to the plaintiff over a period of years." *Williamsburg*, slip op. at 2 (Sept. 3, 1982) (Memorandum). It apparently concluded that this promise was legal because the "damages [Gatlinburg asked for in its antitrust claim] would not necessarily include a recovery of the fees paid and to be paid by [Gatinburg] under the contract." *Id.* Although our reasoning differs from that of the district court, we agree that under *Mullins* appellants can not raise their antitrust defenses.

To understand *Mullins*, we look first at limitations that courts had imposed previously on the applicability of antitrust defenses to contract suits. The leading pre-*Mullins* case is *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), which involved a suit by a seller of onions against a buyer for failure to pay. As a defense, the buyer, who, like the seller, was an onion supplier, alleged that he had been coerced to buy the onions by the seller's threats to dump a large quantity on the market, thereby depressing prices. The contract-suit defendant agreed to buy 50 cars of onions, and both plaintiff and defendant agreed not to deliver any onions on the market for the

remainder of that trading season, thereby artificially decreasing demand and inflating futures prices. The Court rejected the defendant's argument that, because he was coerced into buying the onions by a threat of unlawful conduct, the contract was unenforceable. In doing so, it noted that "the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court." *Id.* at 518. It then stated the following rule for deciding when to enforce illegal contracts:

> Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy . . . "of preventing people from getting other people's property for nothing when they purport to be buying it."

Id. at 520-21 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons, Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting)).

Kosuga was generally viewed as permitting antitrust defenses in only a very narrow class of contract suits, courts being understandably hesitant to interpose complex antitrust issues in a simple suit for breach of contract. *See Mullins*, 642 F.2d at 1311 (D.C. Cir. 1981), *Viacom International, Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975). This court, in particular, read *Kosuga* to limit antitrust defenses to situations where the requested enforcement was of agreements not to compete or other direct market restrictions, *that* made "the court . . . a party to an anticompetitive scheme." *Mullins*, 642 F.2d at 1310 (quoting *Kosuga*, 358 U.S. at 520); *see also id.* at 1311 n.9.

This court's decision in *Mullins*, however, was reversed by the Supreme Court. *See* 455 U.S. at 78-79. In *Mullins*, the defendant, a coal producer, agreed to make contributions to United Mine Worker health and retire-

ment funds based in part on the quantity of coal it purchased from non-union producers. The defendant failed to report such purchases and to make contributions based on them. After the contract expired, the union sued to collect the owed contributions. Clearly, enforcement of the promise to contribute to the welfare fund would not have directly impeded competition at that point in time. *See id.* at 81 n.6. Nonetheless, the Supreme Court allowed the asserted antitrust defense, stating:

> If [defendant] Kaiser's undertaking is illegal under the antitrust . . . laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes.

Id. at 79.

In so holding, however, the Court cited with favor language in *Kosuga* that lower courts had relied on to strictly limit applicability of antitrust defenses. *See* 455 U.S. at 80 ("plea of illegality based on violation of the Sherman Act has not met with much favor") (quoting *Kosuga*, 358 U.S. at 518). In addition, *Mullins* accepted the *Kosuga* rationale that an antitrust defense to a contract suit may be raised only where enforcement "would make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Id.* at 81 (quoting *Kosuga*, 358 U.S. at 520). In *Mullins*, the promise to contribute to the health and retirement funds in proportion to defendant's purchases of non-union coal was a means by which the plaintiff "enforced" restraints on purchases of non-union coal by linking contributions to the purchase of non-union coal. This promise *on its face* embraced the very restraint of trade that the defendant

alleged violated the Sherman Act. Had the Court assisted the union in collecting such contributions, it would have effectively become a party to the allegedly illegal scheme to discourage non-union coal purchases. Thus, in permitting the defendant to raise its antitrust defense in *Mullins*, the Court opened the window only a notch to antitrust defenses, *i.e.*, it refused to enforce a promise to pay that was itself a mechanism to police anticompetitive conduct.

Unlike the "illegal promise" in *Mullins*, the promises to pay franchise fees in this case do not appear on their face to be primarily means to enforce the allegedly illegal tie-ins between the wax figures and start-up services. They appear rather to be a consideration for goods and services, to be paid for on an installment basis, *i.e.*, a routine exchange which *Mullins* was careful to distinguish from the penalty-like agreement it refused to enforce. *See Mullins*, 455 U.S. at 80 (antitrust defense disfavored in action to recover agreed price for goods sold). This is not a case where the appellants turned to an alternative supplier of start-up services and now object to paying a "penalty" for doing so.[9] To transform the contracts here into illegal tie-ins would require complex proof of monopoly power in the tying market and leverage of that power in the tied market. Even then, their vice would extend only to the amount that the agreed prices exceeded the fair value of the goods and services received and consumed—the portion of the prices that could be traced to the illegal practice. The complexity of proof and speculative nature of appellants' defenses seem to us to place

[9] Enforcement of the bulk of the payments as they became due would not have affected the tied market, since the obligations to make most payments arose well after the allegedly tied start-up services had been supplied and consumed; this is in contrast to *Mullins* where the obligation to pay arose at the time of purchase of non-union coal, and enforcement at that time would have imposed an immediate penalty for breaching the union's illegal restraint of trade.

them outside of the *Mullins* exception and clearly within the ambit of disfavor for such defenses articulated in *Kosuga*. And even if there might be grounds for such a defense in other cases, we reject it here, where it was first raised ten years after the figures and the "tied" start-up services had been received and consumed without objection by the buyer.[10] We therefore hold in the circumstances of this case that the obligation to make franchise payments persists and the defense that the original agreement included a tainted tie-in sale may not be raised. The remote danger, in a case such as this, that the court will be a party to enforcing an illegal restraint, seems far outweighed by the probability that allowing the defense would let the buyer escape from its side of a bargain long after it had secured exactly what it had bargained for, as well as involve the courts in a prolonged controversy over whether an illegal tie-in existed due to the seller's market power and how that tie-in affected the agreed price for goods and services.

We also hold that appellants cannot raise any illegality that may attach to the Gatlinburg lease as a defense to appellees' counterclaim for lease payments. Appellants nowhere attack their obligation to pay rent, standing alone, as illegal under the Sherman Act. Such a rationale would lead to the absurd result that all leases violate the antitrust laws. Instead, appellants allege that they were coerced to lease the figures as part of a scheme by ap-

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[10] Our construction of *Mullins* does not necessarily preclude antitrust defenses to all tie-in contracts. Where the tying arrangement calls for payments for ongoing receipt of the tied product, or payments in proportion to the quantity of tied product purchased from competitors, a court might find the payments to be a "mechanism" by which the contract-suit plaintiff "enforces" the tie-in, and allow an antitrust defense to be raised under *Mullins*. *Cf. Avondale*, 677 F.2d at 1058 (under *Mullins*, antitrust defense precluded because plaintiff "did not seek enforcement of the actual tie-in"). This case, however, involves neither an ongoing provision of the tied product nor payments for purchases from competitors.

pellees to perpetuate their monopoly over Lynch figures. But this allegation raises factual controversies, perhaps relevant to appellants' contentions that the lease was part of a bigger scheme to monopolize the wax museum figure market, that are entirely unrelated to the contract claim before us. It is precisely this type of antitrust defense that *Kosuga* clearly held, and *Mullins* affirmed, to be inappropriate in a simple suit for the purchase price of delivered goods. *See Mullins*, 455 U.S. at 80, *Kosuga*, 358 U.S. at 431. In accord with these cases and the district court's decision, we hold that Gatlinburg may not raise the alleged antitrust illegality of its lease of Lynch figures as a defense to appellees' suit for rent.

IV. Relief Awarded for Appellees' Counterclaims

We next consider appellants' attack on the award of prejudgment interest and the order requiring them to make future franchise and lease payments as they come due. Although appellants' obligations to pay franchise fees and rent under the Gettysburg and Gatlinburg agreements ended in 1982, Williamsburg's obligation to pay 2½% of gross receipts runs in perpetuity.

We find no merit to appellants' position on the issue of prejudgment interest. The district court properly followed the District of Columbia's statutory prescription, which states:

> In an action . . . to recover a liquidated debt on which interest is payable by contract or by law or usage, the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.[11]

D.C. Code § 15-108 (1981).

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[11] Appellants' suggestion that Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293 (D.C. App. 1974), precludes prejudgment interest whenever the claim is subject to a counterclaim borders on

We find more convincing appellants' contentions that the district court did not properly justify granting injunctive relief requiring future payment of fees as they become due. The district court apparently did not consider the contract to have been terminated or repudiated.[12] By requiring future payments, it essentially ordered appellants to continue performing their contractual obligations. The court thus denied the appellants any opportunity to repudiate the contract and thereby obligate appellees to mitigate damages flowing from any future breach. *See* Restatement (Second) of Contracts § 350.

The district court, however, entered its order before it determined that the appellees did not owe continuing operating services under the franchise agreements. Thus, after it entered its order, it may have concluded that appellees did not in fact owe anything more to appellants under the franchise agreements. In that case, appellants' failure to pay the fees may have been a total breach. *See id.* § 243 ("Effect of a Breach by Non-Performance as Giving Rise To a Claim for Damages for Total Breach"). But, if that is the case, the damages flowing from the total breach should have been reduced to a sum certain, if possible. The only justification for ordering future payments as they become due would be a finding of total

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the absurd. *Giant* merely held that if a plaintiff obtains a liquidated judgment, and the defendant prevails on a counterclaim that is "an offset in the nature of payment [of the liquidated debt]," then the plaintiff will be awarded interest only on the difference between his claim and the defendant's counterclaim. *Id.* at 1303. *Giant* thus has no bearing here where (1) appellants did not prevail on their claim, and (2) the claim was not one for "an offset in the nature of payment."

[12] The district court explicitly noted it retained jurisdiction to modify its order should the appellees fail in the future to perform any of their obligations under the agreements. *Williamsburg*, slip op. at 4 n.1 (Sept. 3, 1982) (Memorandum). It thus treated the contract as an ongoing one imposing obligations on both appellees and appellants.

breach (after appellees performed their part of the contracts) and so great an uncertainty about the amount of damages (based on future gross receipts) that ordering future payments was necessary to ensure their accurate assessment. *See id.* §§ 359, 360 (specific performance justified where damages not provable with reasonable certainty). The court's rationale is not sufficiently developed for us to determine if injunctive relief ordering payment of franchise fees as they become due is warranted under this theory. We remand to the district court for a determination of whether the breach was total or partial, and if total, whether the nature of the promised payments justifies its order of future payments.

V. Remaining Issues

We need not dwell long on the two remaining points on appeal—the disqualification of C&B and the district court's order consolidating these three cases.

The appellants contend that the district court erred by not finding that C&B had represented Gettysburg in a matter "substantially related" to the franchise agreements at issue here. Brief for Appellants, at 28. The "substantial relation" test, which the district court properly invoked, was meant to protect an attorney's former client from subsequent use of confidential disclosures by the attorney. *See T.C. Theatre Corp.* v. *Warner Brothers Pictures, Inc.*, 113 F. Supp. 265, 168 (S.D. N.Y. 1953). The court should not "inquire into the nature and extent" of any confidential disclosures. *Id.* Still, the party seeking disqualification has the burden of demonstrating a relationship between the matters in which counsel had represented him and those at issue which makes it reasonable to assume that some relevant confidential disclosures were made. *See id.* at 268; *cf. Government of India* v. *Cook Industries, Inc.*, 569 F.2d 737, 739 (2d Cir. 1978) (movant must show matters are almost identical before court will disqualify counsel).

In this case, the district court allowed the appellants to develop a voluminous record on the extent of C&B's representation of Gettysburg. It found that C&B did not represent Gettysburg on matters related to the franchise agreement. It further noted that C&B's representation of Gettysburg was handled primarily through Dennis, who in addition to being owner of appellee Historic was then a conventurer in appellant, Gettysburg. Thus, it concluded that C&B was not in a position to receive information that Gettysburg intended to keep confidential vis-a-vis Historic. We do not think these factual findings are erroneous, much less clearly so. *Cf. Allegaert* v. *Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (holding "substantial relation" test not even implicated in such a situation).

Finally, the issue of whether these cases should not be consolidated because the antitrust issues are so complex that, at trial, a jury might be confused is mooted by our prior rulings.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment for appellees on appellants' tying claims, but vacate that grant on Gatlinburg's monopolization claim stemming from its lease of Lynch figures and remand for further proceedings on that claim. We also affirm the grant of summary judgment for appellees on their contract claims for monies due under the franchise and lease agreements, but vacate the order that appellants pay future fees as they become due, remanding to the district court for reconsideration of that order. We affirm the district court on all other rulings.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-01243

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

And Consolidated Case Nos. 82-2330,
82-2337, 83-1268, 83-1269 and 83-1270

[Filed Feb. 10, 1984]

Before: TAMM and WALD, Circuit Judges, and HENLEY, *Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Circuit Judge Wald on February 10, 1984 be, and hereby is amended as follows:

Page 23 of the slip opinion, lines 1 & 2, delete the first two lines of the text in their entirety, and in lieu thereof substitute the following:

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

"on purchase of non-union coal. By linking contributions to the purchase of non-union coal, this promise *on its face*".

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

NOTE: The language amended by this Order appears on p. 22a of Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C. 20001

GEORGE A. FISHER
Clerk

February 10, 1984

RE: Appeal No. 82-2329 et al.—National Souvenir Center, Inc., et al. v. Historic Figures, Inc., et al.

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

/s/ Denise C. Thomas
DENISE C. THOMAS
Opinions Clerk

Enclosure

DISTRIBUTION:

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Jerome S. Wagshal
James C. McKay

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

[Filed May 19, 1981]

MEMORANDUM ORDER

The above-entitled actions are before the Court on defendants' motions for summary judgment.[1] Plaintiffs

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[1] These actions are related, although not consolidated, and involve essentially the same parties and the same claims. Virtually identical papers have been filed by the parties in all three cases, the instant motions for summary judgment were argued together, and

complain that various agreements between themselves and defendants, and agreements among the defendants, violate the antitrust laws; defendants counterclaim for the fees due and owing under their agreements with plaintiffs.[2] Because the Court finds that there are genuine issues of material fact with regard to plaintiffs' claims, defendants' motions concerning those claims must be denied. Defendants' motions in connection with their counterclaims present different considerations, however, and will be granted.[3]

I

In 1958, Frank Dennis, who was until 1977 the president and chief operating officer of defendants Historic Figures, Inc. (HF), and National Historical Museum, Inc. (NHM), a subsidiary of HF, established a wax museum in Washington, D.C., with the assistance of defendant Dorfman, the founder, president, and principal stockholder of defendant Lynch Display Corporation (Lynch), the manufacturer of the figures displayed in the museum. Unlike the wax figures displayed in the European wax museums that had inspired Dennis to create a similar museum in Washington, the figures designed and manufactured by Dorfman are composed of a plastic material.

The defendants entered into a series of agreements over the years since the founding of the Washington museum, all of which are exclusive sales agreements per-

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there is no factual difference that would warrant a different result in the resolution of the pending motions. This order is dispositive of defendants' summary judgment motions in all of the above-entitled actions.

[2] Defendants have moved for summary judgment on all claims, including their counterclaims.

[3] Also before the Court are plaintiffs' request that certain language be deleted from the Court's order of February 11, 1981, and two motions by plaintiffs to strike. These have been considered by the Court and are denied.

taining to the display figures. The more recent agreements take into account the "franchise" enterprise developed by defendants subsequent to the establishment of the Washington museum. Basically, the defendants bound themselves contractually to package together the sale[4] of the Lynch figures and the "franchises"[5] for new wax museums. Pursuant to these agreements, defendants have franchised a number of museums, including those of the plaintiffs, in conjunction with the sale or lease of the Lynch figures. Under the "franchise" agreements, defendants were obligated to provide various start-up services or products,[6] and they agreed to "make themselves available" to provide further services at additional cost, in exchange for a fee of five percent of the franchisee's annual gross receipts.[7] With regard to the three museums involved in these lawsuits, the total franchise fees (including those paid and those that are the subject of the defendants' counterclaims) amount to more than

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[4] In the case of the Gatlingburg museum, No. 77-1243, the figures were leased on a long-term basis rather than sold. This lease agreement is also challenged, both as part of an illegal tie-in and as an unlawful exercise of monopoly power.

[5] Although the word "franchise" is used in the challenged agreements and in this Memorandum, the characteristics that generally typify a franchise arrangement are not present here: there is no operation under a common name or designation, no cooperative advertising, no periodic inspections, and no establishment of common standards or business practices.

[6] The possible application of Section 3 of the Clayton Act to the facts of these cases turns on whether that which was supplied under the franchise agreements is in the category of "services," as that section applies only to "goods, wares, merchandise, machinery, supplies or other commodities." This is one issue of fact which the Court finds unresolved, and the Court will therefore not dismiss the counts alleging Clayton Act violations.

[7] The payments are to continue indefinitely under the contract applicable to the Gatlinburg museum; the payments are limited to a period of 20 years in the agreements regarding the other two museums.

$750,000; the lease fees incurred by the Gatlinburg plaintiff amount to more than $500,000. The figures, of course, do not reflect the amounts involved in connection with the other seven museums franchised by defendants in the United States.

II

In deciding a motion for summary judgment, factual matters must be viewed in the light most favorable to the party opposing the motion. *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979). The inferences to be drawn from the facts must be viewed in the same manner, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The basic claim[8] in these actions is that defendants unlawfully conditioned the sale or lease of the Lynch display figures to plaintiffs upon the purchase of a "franchise" by plaintiffs. There are two theories on which plaintiffs may be able to prevail with respect to their tie-in claims: (1) they may be able to establish a *per se* tying violation; or (2) they may prevail on a Rule of Reason analysis, that is, if they "can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated," *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500 (1969) (*Fortner I*). *Accord, United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610,

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[8] Defendants assert that plaintiffs' restraint of trade and monopolization claims with regard to the exclusive dealing arrangements between Lynch and NHM "add nothing to plaintiffs' tie-in claims." Brief for Defendants at 27. No authority is cited in support of that proposition and it apears to be contradicted by the Supreme Court's decision in *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n. 1 (1977). Also rejected is defendants' contention that the language of an amendment to the exclusive sales agreement between Lynch and NHM compels dismissal, on the theory of uncontested facts, of the claim regarding the Gatlinburg lease agreement in No. 77-1243.

612 n. 1 1977) (*Fortner II*); *Bogus* v. *American Speech & Hearing Association*, 582 F.2d 277, 287 (3d Cir. 1978); *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 380 (5th Cir. 1977).

The elements of a *per se* tying violation under Section 1 of the Sherman Act, as established in *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958), and reiterated in *Fortner I*, *supra*, are (1) that the challenged arrangement is in fact a tying arrangement, (2) that the seller has sufficient economic power with respect to the tying product, and (3) that a "not insubstantial" amount of interstate commerce in the tied product is affected.

As discussed below, the Court finds that there are genuine issues of material fact with regard to each of the three elements, and that defendants' motions with regard to plaintiffs' tie-in claims must, therefore, be denied.

III

To establish the first element, plaintiffs must prove that separate products are involved, that is, that the display figures and the "franchises" do not constitute a single product.[9]

There are several issues of material fact in connection with the question of whether a tying arrangement exists.

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[9] Defendants argue that plaintiffs must, in addition, show coercion. However, if there was, factually, a tying arrangement there also was coercion. "Where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific*, *supra*, 356 U.S. at 6, n.4. In order for plaintiffs to establish that the arrangement is in fact a tying arrangement, they must show that their purchase or lease of display figures was conditioned upon their purchase of a "franchise," that they could not have obtained the display figures separately, and if they make that showing, they have demonstrated coercion.

Defendants assert that this is a "left shoe, right shoe" matter, where one product goes hand-in-hand with the other and severance would not be reasonable; that their business is establishing wax museums, not selling display figures and selling franchises; and that, even if the products are separable in today's market, they were not separable during the infancy of the wax museum industry in this country when the challenged agreements were made. Plaintiffs, on the other hand, point out that the products come from two different sources and are priced separately. Plaintiffs also have submitted evidence through affidavits, including that of a long-time officer of the International Association of Wax Museums, that the products are separable.

Thus, it is quite clear that the issue of whether the display figures and the "franchise" [10] constitute one product or more than one product is, on this record, an issue of fact. Similarly, plaintiffs' evidence in the form of writings by defendant Dorfman containing statements that the Lynch display figures could not be obtained separately from the NHM franchises, and the affidavit of the original organizer of the Gatlinburg museum, Shelby Boyd, to the same effect, are sufficient to raise an issue of material fact with regard to the existence of a tying arrangement in general and with regard to the coercion matter in particular.[11]

The second element under *Northern Pacific Railway*—sufficient economic power with respect to the tying product, here the display figures—may be established through a sufficient showing of uniqueness of those figures. Defendants contend in this respect that the Lynch figures are not sufficiently unique and that plaintiffs could have,

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[10] Defendants' attempt to analogize these cases to traditional franchise cases falls short of the mark since, as noted *supra* at n. 5, the arrangements in question are not typical franchises.

[11] See note 9 *supra*.

like Dennis, engaged the services of someone like Dorfman to manufacture the figures. Plaintiffs, on the other hand, have submitted various statements by Dorfman and Dennis to the effect that trade secrets are involved in the manufacture of the figures and that satisfactory substitutes were unavailable. Again, this question is a genuine one of material fact that cannot be resolved on this record.

The relevant figure for the purpose of assessing the third element under *Northern Pacific Railway*—whether a "not insubstantial" amount of interstate commerce in the tied product is affected—is "the total volume of sales tied by the sales policy under challenge," *Fortner I, supra*, 394 U.S. at 502. On this issue, defendants assert that there is no genuine issue as to whether a "not insubstantial" amount of interstate commerce in the tied product is affected, arguing that plaintiffs disparage the "franchise" as worthless and that a substantial portion of the franchise fees actually represents deferred payments for other items. But that, too, clearly, is an issue of fact; it must be decided on that basis;[12] and summary judgment on a *per se* theory is not proper.[13]

IV.

The final issue before the Court concerns defendants' counterclaims for the fees due and owing under the

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[12] Moreover, the dollar amounts involved here total a great deal more than the $180,000 held "not insubstantial" by the Supreme Court in *Fortner I, supra*, 394 U.S. at 502, and the three museums operated by plaintiffs represent only a portion of defendants' business in display figures and franchises.

[13] Moreover, defendants seem to assume that if they were to establish as a matter of law that plaintiffs cannot prove a *per se* violation they would be entitled to summary judgment on plaintiffs' claims. That is not the law. Even if—contrary to the Court's conclusion—defendants could prevail on summary judgment as to the *per se* theory, plaintiffs would still be entitled to proceed under a "rule of reason" analysis.

franchise agreements and the Gatlinburg lease agreement. The general rule is that a plea of illegality based on violation of the Sherman Act is not an adequate defense to an action based on contract. *Kelly* v. *Kosuga*, 358 U.S. 516, 518 (1959); *Mullins* v. *Kaiser Steel Corp.*, —— F.2d ——, 1980-2 Trade Cas. ¶ 63,537 (D.C. Cir. 1980). The exception into which plaintiffs attempt to squeeze these cases arises where enforcement of the contract "would itself be enforcing the precise conduct made unlawful by the Act." *Kelly* v. *Kosuga*, *supra*, 358 U.S. at 520-21. But as the court made clear in *Mullins*, *supra*, that exception is "tiny"; it "does not lie against a contract that is 'an intelligible economic transaction in itself' "; and only if enforcement of an otherwise valid contract would make the court a party to the illegality will it opt in favor of a windfall for the innocent party to the contract. *Mullins* v. *Kaiser Steel Corp.*, *supra*, 1980-2 Trade Cas. at pp. 76,887-89.

Plaintiffs argue that granting defendants' summary judgment motions with respect to the counterclaims would amount to "deciding the case without determining the antitrust claim." Plaintiffs' Reply Memorandum at 16. On the contrary, under the standards enunciated by the Supreme Court in *Kelly* and by the Court of Appeals for this Circuit in *Mullins*, denying summary judgment on the counterclaims would be tantamount to deciding the antitrust claims in favor of plaintiffs.[14] In order to prevail on the counterclaims, defendants need not show that the franchise and lease agreements at issue do not violate the antitrust laws; a showing solely to the effect that those agreements do not fall within the *Kelly* exception permits the Court to "simply refuse to entertain the illegality defense," *Mullins*, *supra*, 1980-2 Trade Cas. at

[14] Plaintiffs have not moved for summary judgment in these actions. Further, even if all of plaintiffs' factual allegations are true, the purported illegality of the disputed agreements is by no means clear.

76,887, n.6. The Supreme Court's reluctance to supplement the remedies provided by the antitrust laws is particularly appropriate where, as here, plaintiffs' claims for relief under those statutes are before the Court. Accordingly, defendants are entitled to prevail on their counterclaims.

In accordance with the foregoing, it is this 18th day of May, 1981,

ORDERED That defendants' motions for summary judgment with regard to the complaints in the above-entitled actions be and they are hereby denied, and it is further

ORDERED That defendants' motions for summary judgment with regard to all of their counterclaims in the above-entitled actions be and they are hereby granted as to liability, and it is further

ORDERED That defendants shall file within 15 days of the entry of this order a motion for summary judgment as to damages with respect to all of their counterclaims, and plaintiffs shall have 15 days thereafter in which to respond to such motion.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

[Filed Sept. 3, 1982]

ORDER AND FINAL JUDGMENT

On May 18, 1981, the Court granted summary judgment in favor of defendants as to plaintiffs' liability on defendants' counterclaims. On June 3, 1981, in accordance with the Court's May 18 order, defendants filed motions for summary judgment as to damages. Thereafter, plaintiffs filed an opposition to defendants' motions as well as their own motion to stay further proceedings or in the alternative for reconsideration of the Court's grant of defendants' summary judgment motions with respect to the issue of liability. Plaintiffs also requested oral argument with respect to these matters. By order of September 17 the Court denied plaintiffs' motions for stay or reconsideration. Thereafter, on February 8, 1982, plaintiffs moved to vacate this Court's order granting summary judgment as to the issue of plaintiffs' liability on defendants' state law counterclaims.

Upon consideration of plaintiffs' February 8 motion to vacate and defendants' earlier motion for summary judgment as to damages, and upon consideration of the papers submitted by the parties in connection therewith and the entire record in this case, and the Court having concluded that, subject to the provisions of paragraph 10 below, plaintiffs' motion should be denied and defendants' motion should be granted, and having determined that there is no just reason for delay of entry of final judgment on the counterclaims, it is this 3d day of September, 1982, ordered as follows:

I. *Williamsburg Franchise Agreement Obligations*

1. The motion of defendant National Historical Museum, Inc. ("NHM"), for summary judgment as to damages on its counterclaim is granted, jointly and severally, against plaintiff Williamsburg Wax Museum, Inc., and all successor corporations thereto (including C. M. Uberman Enterprises, Inc.), hereinafter collectively desig-

nated as "Williamsburg plaintiffs," in the amount of $56,382.99 plus such additional interest with respect to overdue franchise fees at the rate of six (6) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

2. Williamsburg plaintiffs are ordered and directed to pay to NHM all future franchise fees as they become due in accordance with the terms of the Williamsburg franchise agreement and shall furnish to NHM all such financial reports and make available all such books and records as NHM may request in accordance with the provisions of said agreement.

II. *Gettysburg Franchise Agreement Obligations*

3. The motion of NHM for summary judgment as to damages on its counterclaim is granted, jointly and severally, against plaintiff National Civil War Wax Museum, Inc., and all successor corporations thereto (including C. M. Uberman Enterprises, Inc.), hereinafter collectively designated as "Gettysburg plaintiffs," in the amount of $94,243.60 plus such additional interest with respect to overdue franchise fees at the rate of six (6) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

4. Gettysburg plaintiffs are ordered and directed to pay to NHM all future franchise fees as they become due in accordance with the terms of the Gettysburg franchise agreement and shall furnish to NHM all such financial reports and make available all such books and records as NHM may request in accordance with the provisions of said agreement.

III. *Gatlinburg Franchise Agreement Obligations*

5. The motion of NHM for summary judgment as to damages on its counterclaim is granted, jointly and severally, against plaintiff National Souvenir Center, Inc., plaintiff Historical Reviews, Inc., and all successor corporations thereto (including C. M. Uberman Enterprises, Inc.), hereinafter collectively designated as "Gatlinburg plaintiffs," in the amount of $112,161.35, plus such additional interest with respect to overdue franchise fees at the rate of six (6) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

6. Gatlinburg plaintiffs are ordered and directed to pay to NHM all future franchise fees as they become due in accordance with the terms of the Gatlinburg franchise agreement and shall in connection therewith furnish to NHM all such financial reports and make available all such books and records as NHM may request in accordance with the provisions of said agreement.

IV. *Gatlinburg Lease Agreement Obligations*

7. The motion of defendant Lynch Display Corporation ("Lynch") for summary judgment as to damages on its counterclaim is granted, jointly and severally, against Gatlinburg plaintiffs in the amount of $328,859.94 plus such additional interest with respect to overdue display figure rental payments at the rate of ten (10) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

8. Gatlinburg plaintiffs are ordered and directed to pay to Lynch all future monthly rental fees and percentage rent as they become due in accordance with the terms of the Gatlinburg lease agreement and shall furnish to Lynch all such financial reports and make available all such books and records as Lynch may request in accordance with the provisions of said agreement.

V. *Finality*

9. The Court having determined that there is no just reason for delay, this Order and Final Judgment shall be entered forthwith.

VI. *Stay of Judgment*

10. In accordance with Fed. R. Civ. P. 62(h), enforcement of this Order and Final Judgment shall be stayed until the entry of final judgments on plaintiffs' complaints, or until further order of this Court, subject to the condition that within ten (10) days the parties, or any of them, submit to the Court for its approval a plan and proposed order pursuant to which plaintiffs will be required to deposit with the Clerk of the Court all past due franchise and rental fees, plus interest, as provided in paragraphs 1, 3, 5 and 7 of this Order and Final Judgment, and all future franchise and rental fees as they become due, and pursuant to which the Clerk will be directed to purchase United States treasury bills or other high-yield, appropriately secured obligations and hold them or re-invest them in similar securities pending the entry of final judgments on plaintiffs' complaints or until further order of this Court.

VII. *Retention of Jurisdiction*

11. The Court shall retain jurisdiction to effectuate and enforce the terms of this Order and Final Judgment.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

[Filed Sept. 3, 1982]

MEMORANDUM

I

On May 19, 1981, the Court granted defendants' motions for summary judgment as to liability on the counterclaims. Plaintiff has moved to vacate that judgment on the basis of *Kaiser Steel Corp. v. Mullins*, 102 S.Ct. 851 (1982). *Kaiser Steel* reversed *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), and it distinguished *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) on both of which this Court had relied in its grant of summary judgment. The motion to vacate essentially presents the question whether the instant action is controlled by the factual situation and the law underlying the Supreme Court's decision in *Kaiser Steel* or by the facts and the law in the earlier *Kosuga*.

In *Kaiser Steel* it was held that a coal producer, when sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, is entitled to defend based on the illegality of that promise under the antitrust laws. In so holding, the Court departed from the broad pronouncement of the Court of Appeals in the same case which had suggested, as this Court said in its May 19, 1981 memorandum, that a plea of illegality based on a violation of the Sherman Act could not be a defense to an action based on contract. *Kaiser Steel* laid down a narrower and more specific rule. If, as in *Kosuga*, there are two promises in a business relationship, one legal and the other illegal, the legal promise will be enforced notwithstanding the unenforceability of the second promise under the antitrust laws. On the other hand, if, as under the *Kaiser Steel* facts, the promise being sued on is itself illegal under the antitrust laws, it will not be enforced.

Here, defendants are suing in their counterclaim for monies for goods or services furnished to plaintiff over a period of years. Plaintiff's promises to pay for those

goods and services are quite separate and distinct from the possible obligation of defendants to pay damages should it ultimately be found, after a trial, that the provisions of the contracts which conditioned the sale or lease of the display figures at issue here, violated the antitrust laws. These damages would then be measured in accordance with the evidence adduced with respect to the alleged tie-in feature; they would not necessarily include a recovery of the fees paid and to be paid by plaintiff under the contract. Yet it is that which plaintiff is, in effect, demanding in its defense to the counterclaim. To extend *Kaiser Steel* as plaintiff would have it would be potentially to embroil the antitrust laws in every suit to collect payment for goods and services. The motion to vacate will be denied.

II

The parties have each submitted a proposed order and final judgment regarding damages as well as various memoranda on those issues in relation thereto that remain contested.

First. On the question of pre-judgment interest, plaintiff relies upon *Giant Food, Inc.* v. *Jack I. Bender & Sons*, 399 A.2d 1293 (D.C. App. 1979) in support of the proposition that the Court is precluded from awarding such interest. In *Giant Food*, the D.C. Court of Appeals held that on passing upon the prejudgment interest question where there is both a liquidated claim and an unliquidated counterclaim, the District of Columbia courts must apply an "interest on balance" rule, that is, prejudgment interest is to be awarded only on the amount by which the liquidated claim exceeds the unliquidated claim. However, the key fact in that case was that the unliquidated claim, like the liquidated claim, had been reduced to judgment; here not only has there been no judgment but there may never be a judgment in plain-

tiff's favor. There is no basis for plaintiff's opposition to pre-judgment interest.

Second. Plaintiff contends that defendants are not entitled to injunctive relief requiring payment of future franchise and rental fees and granting them access to plaintiff's books and records for the purpose of verifying such payments. The Court has held that plaintiffs are liable for the fees due and owing, and it is established, therefore, that plaintiffs will be liable for future franchise and rental fees as they become due. The Court will not, and it need not, require defendants to file a new lawsuit or a new motion for summary judgment every time another payment under the agreement becomes actually due and owing.[1]

Third. Defendants have requested that the Court direct the entry of judgment on the counterclaim pursuant to Rule 54(b), Federal Rules of Civil Procedure, presumably in order that they may execute thereon. Plaintiff claims that (1) the counterclaim and the principal claim are so intimately linked that the Court should not permit execution on the judgment with respect to the former pending the outcome of the litigation with regard to the latter, and (2) defendants may not be solvent. But, as indicated in Part I *supra*, the claims and the counterclaims are not truly dependent upon one another. As concerns the possible solvency of defendants, they have recommended that the Court adopt the procedure suggested in *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 13 n. 3 (1980) of requiring the losing party to deposit the amount of the judgment with the Court, directing the Clerk to purchase high yield government obligations and to hold them pending the outcome of the

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[1] Plaintiff argues that defendants may fail in the future to perform the agreements or to meet the obligations they impose. Since the Court will retain jurisdiction, it will be able to modify or vacate the injunction should the remote contingency envisioned by plaintiff actually occur.

case. The Court will follow that recommendation and thus eliminate any concern regarding defendants' solvency.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

Dated: September 3, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying memorandum filed on this date, it is this 23d day of December, 1982,

ORDERED That defendants' motion for summary judgment in civil actions 77-0131 and 77-0093 and for partial summary judgment in civil action 77-1243 be and it is hereby granted, and it is further

ORDERED That the complaints in civil actions 77-0131 and 77-0093 be and they are hereby dismissed with prejudice, and it is further

ORDERED That those counts of the complaint in civil actions 77-1243 alleging antitrust violations due to an illegal tying arrangement be and they hereby are dismissed with prejudice.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

The following ruling is reported at: 554 F. Supp. 182 (D.D.C. 1982); 1982-83 Trade Cas. ¶ 65,202 (Dec. 23, 1982)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

MEMORANDUM

Plaintiffs in these consolidated antitrust cases are three wax museums owned in common by C. M. Uberman Enterprises, Inc. since 1973. Each museum came into being

in the 1960's by means of a "franchise agreement" with defendant National Historic Museum, Inc., the wholly owned subsidiary of Historic Figures, Inc. Plaintiffs challenge these contracts as illegal tying arrangements. They contend that the defendants acted in concert illegally to condition the sale or lease [1] of Lynch's display figures on the purchase by plaintiffs of National franchise agreements.[2] The agreements obligated the museums to pay National five percent of their gross admissions receipts for twenty years [3] in exchange for National's promise to provide certain services and to refrain from establishing competing museums in nearby locations.[4] Plaintiffs survived a previous motion for summary judgment in which defendants maintained that no tying violation could have occurred because each contract involved only one product, the establishment of a wax museum. The Court held that whether the contracts

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[1] The figures were sold to Gettysburg (77-0131) and Williamsburg (77-0093). They were leased to Gatlinburg (77-1243). Although the franchise/lease arrangement in Gatlinburg is challenged on a tying theory, the lease is the target of a separate challenge along the lines of a "refusal to sell' such as existed in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[2] Historic Figures, Inc. and National Historical Museum, Inc. had established a wax museum in Washington, D.C. with the help of defendant Dorfman, the founder, president and principal stockholder of defendant Lynch Display Corporation (Lynch). The defendants later bound themselves contractually to package together the sale of the Lynch figures and the "franchises" for new wax museums.

[3] In addition, the Williamsburg museum agreed to pay National at a rate of 2½ percent for every year of operation past twenty years.

[4] The first franchise agreement states that the percentage payments are "in consideration of the unique figures and services to be performed by National." The second and third agreements refer only to services, presumably because the Gatlinburg museum contracted separately to lease the figures directly from Lynch and the Williamsburg museum contracted to buy them from Lynch.

covered one or two products was a material question of fact inappropriate for summary disposition. Now defendants have moved for summary judgment in two cases and partial summary judgment in the third [5] on the ground that insofar as a tying violation is alleged, it is barred by the Clayton Act's four-year statute of limitations, 15 U.S.C. § 15b.[6] As the contracts that underlie plaintiffs' claims were admittedly executed well over four years before plaintiffs filed their complaints in 1977,[7] the question for decision is whether plaintiffs may invoke one of the judicially-crafted exceptions to Section 15b. After careful consideration of the parties' pleadings and their presentations at oral argument, the Court finds that no exception is applicable. Defendants' motion will therefore be granted.

The two exceptions to which plaintiffs point [8] are not really exceptions at all, but they are actually constructions of what it means for a private antitrust action to "accrue." Under the first of these two constructions, a new cause of action accrues "whenever the defendant commits an overt act in furtherance of an antitrust conspiracy, or in the absence of an antitrust conspiracy,

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[5] Plaintiffs' claim that the Gatlinburg lease was a refusal to sell and an unlawful exercise of monopoly power is unaffected by the instant motion. See note 1, *supra*.

[6] Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Plaintiffs brought these actions under the treble damages provision of Section 15.

[7] The Gettysburg contract was executed September 22, 1960. The Gatlinburg contract was executed May 31, 1962. The Williamsburg contract was executed September 22, 1967.

[8] Plaintiffs do not invoke the exceptions triggered by a defendant's fraudulent concealment or by the prior initiation of a government antitrust action.

commits an act that by its very nature is a continuing antitrust violation." *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982) (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-40 (1971) and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 501 n.15 (1968)).[9] Thus, no matter how long ago the initial antitrust violation occurred, the action will not be time-barred by § 15b "if defendant committed further overt acts or continuing violations which injure plaintiff's business during the limitations period." *Electroglas, Inc.* v. *Dynatex Corp.*, 497 F. Supp. 97, 104 (N.D. Cal. 1980). The second construction is more concerned with the effects of a defendant's allegedly illegal act. It allows that act to be " 'revived' outside the limitations period as a basis for damages, because when the act originally occurred, plaintiff's damages were speculative or unprovable." *Kaiser Aluminum, supra*, 677 F.2d at 1051. This theory also derives from *Zenith, supra*.

In an effort to bring themselves within the first theory, plaintiffs have pointed to the continuing payments they made to National, to National's occasional demands for payment, to National's continuing obligation to be available should plaintiffs request its services, and to defendants' general "involvement" with plaintiffs' businesses as evidence that "overt acts or continuing violations" occurred between 1973 and 1977. When asked to explain the antitrust injury occasioned by these alleged overt acts or continuing violations, however, plaintiffs' counsel answered,

> [T]hese plaintiffs were diminished in their business and property. . . . [They] had to shell out money they would not have wanted to shell out if that franchise had not been tied to the sale of the figures.

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[9] In *Zenith*, a conspiracy was alleged and proved. *Hanover* involved no conspiracy but rather the unlawful exercise of monopoly power.

> . . . [T]he money is being paid . . . and there is the antitrust violation.

However, as two federal courts have observed, "the harm that creates the new cause of action must be '*antitrust* harm, *i.e.*, a continuing injury to *competition*, not merely a continuing pecuniary injury to a plaintiff.'" *Kaiser Aluminum, supra*, 677 F.2d at 1055 (quoting *Electroglas, Inc., supra*, 497 F. Supp. at 105) (emphasis in original). If the law were otherwise, the statute of limitations would have little force whenever a contract allegedly executed in violation of the antitrust laws provided for long-term payments: there would be no repose until four years after the last installment payment. This could be years after the original tainted bargain was struck. In all likelihood, some witnesses would be unavailable.[10] In any event, the case would be characterized by exactly that sort of staleness which it is the object of a statute of limitations to prevent.[11]

A brief description of the parties' relationship during the years 1973 to 1977 suffices to show the accuracy of counsel's concession that his clients suffered only pecuniary injury, not anticompetitive injury, within the limitations period. By 1973 the museums had been operating for some time, displaying the Lynch figures obtained in the 1960's and paying franchise fees to National on a quarterly basis. National was still obligated to remain

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[10] This is the case in the instant actions. For instance, three of the five principals involved in the Gettysburg franchise are deceased.

[11] Cases cited by plaintiffs such as *Fitzgerald* v. *Seamans*, 553 F.2d 220 (D.C. Cir. 1977), are not to the contrary. There are no cases that instruct courts to disregard the Clayton Act's statute of limitations simply because of the "strong congressional policy in favor of antitrust enforcement by private damages suits." *Fitzgerald, supra*, 553 F.2d at 227. The dicta to which plaintiffs refer in *Fitzgerald* was limited to the speculative damages exception which, for reasons elaborated upon below, is inapplicable to these cases.

available to perform additional services upon plaintiffs' request, and to refrain from establishing competing museums, but plaintiffs were under no obligation to buy services from National or from any defendant. Plaintiff's pleadings blame defendants for not providing enough service to warrant the franchise fees[12] at the same time that they criticize them for exercising too much involvement in plaintiffs' businesses.[13] In any event, National was paid extra sums for the later services it provided.[14] It is the law of these cases that the parties intended any post start-up services to be paid for separately, over and above the ongoing franchise fees. Memorandum Order of May 19, 1981, at 3. Thus, plaintiffs were free to turn to other sellers of comparable services; they were not locked into purchasing them from National. There is no evidence that plaintiffs ever attempted to buy services elsewhere nor that they were foreclosed from doing so by some act of defendants. Plaintiffs can point to no act within the limitations period by which any of the defendants affected plaintiffs' competitive standing either as sellers or buyers. All they can complain of is their ongoing commitment to National

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[12] The first Uberman affidavit states that from 1973 to 1975 Uberman requested assistance from National, particularly in connection with the museums' advertising campaigns, but that assistance was not forthcoming.

[13] The second Uberman affidavit, filed in conjunction with plaintiffs' supplemental reply memorandum, refers to numerous phone bills that allegedly show Dorfman's continued involvement with the museums after 1973. The memorandum and affidavit failed to mention how telephone calls and visits by Dorfman, the owner of Lynch and a minority stockholder in the Gettysburg museum could amount to acts causing antitrust injury to plaintiffs.

[14] Most of the services anticipated by the agreements were start-up services. The parties dispute what percentage of the franchise payments is allocable to National's future "availability." They also dispute the value of the services provided by National at the time each museum opened. This haggling resembles a breach of contract controversy more than an antitrust violation.

to pay five percent of the annual gross receipts and the occasional demands of defendants regarding that obligation. These are simply "the abatable, but unabated inertial consequences of some pre-limitations action." *Poster Exchange Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975).

A defendant's continuing receipt of benefits under an illegal pre-limitations contract may, in certain circumstances, prevent plaintiff's case from being time-barred. This doctrine was discussed in *Kaiser Aluminum, supra*, the Fifth Circuit's most recent pronouncement on the application of § 15b to cases involving long-term payments. In *Kaiser*, the court held that the "continued receipt of contract payments" could work a tolling of § 15b only where damages would have been speculative or unprovable within four years of the initial antitrust violation. The *Kaiser* panel thus incorporated the *Zenith* speculative damages exception, and made it clear that its earlier holding in *Imperial Point Colonnades Condominimum, Inc.* v. *Mangurian*, 549 F.2d 1029 (5th Cir. 1977), hinged on the fact that "damages . . . were not ascertainable at the time of the execution of the contracts . . . because the defendants could arbitrarily and unilaterally continue to engage in acts that amounted to overt acts in furtherance of their antitrust conspiracy." 575 F.2d at 523-24.

In its first reply memorandum, filed before *Kaiser*, plaintiffs relied heavily on *Mangurian*. At oral argument, plaintiffs' counsel attempted to fit the cases within the limits imposed by *Kaiser*, arguing that because the franchise fees were not quantified, but were based on gross receipts and therefore would fluctuate depending upon the museums' performance, damages would not have been provable within four years after the contracts were executed. This is incorrect. The percentage had been fixed in the contracts and defendants could not unilaterally change it.

Moreover, a comparison with *Zenith* shows how inappropriate the speculative damages exception would be in these cases. In *Zenith*, a pre-limitations act of defendant had reduced plaintiff's share of the market. The consequences of this reduced share would continue no matter what Zenith or a court did. The Supreme Court therefore held that Zenith's cause of action did not accrue until Zenith's loss could be more accurately measured. In the instant case, any injury plaintiffs suffered was confined to its dealings with National. Presumably damages would be measured by the difference, if any, between the amount plaintiffs paid for the tied account—the franchise services—and the amount they would have paid for comparable services on the open market. A court could have reduced plaintiffs' franchise obligations by this amount, or eliminated them altogether on the theory that the antitrust laws had been violated, at any time subsequent to the execution of the contracts. All plaintiffs had to do was to sue within the limitations period. It was within the power of a court to make plaintiffs whole (unlike the situation in *Zenith*, where external forces would perpetuate and increase the consequences flowing from plaintiff's reduced market share).

Thus, plaintiffs may not take advantage of the "continuing benefits" theory, because they fail to satisfy the speculative damages element, nor can they take advantage of the speculative damages theory standing alone. Plaintiffs' causes of action "accrued" at the time the contracts with National were executed (1960, 1962 and 1967 respectively). No additional cause of action respecting the tying allegations accrued in the four years before plaintiffs filed their complaints.[15] The allegations based

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[15] This holding is consistent with, if not compelled by, the Court's previous ruling awarding judgment on defendants' counterclaims. The Court held that defendants could collect unpaid and owing franchise fees from plaintiffs because even if the contracts had been executed pursuant to an illegal tie-in scheme, the contracts and pay-

on defendants' alleged tying must therefore be dismissed.[16]

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

Dated: December 23, 1982

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ments thereunder were not in themselves illegal. Memorandum Order of May 19, 1981; Memorandum of September 3, 1982; Order and Final Judgment of September 3, 1982.

[16] Plaintiffs have presented no reason why the leasing of the figures in Gatlinburg dictates a different result with respect to the claims of illegal tying. The lease ran for twenty years, the same length as the franchise agreements. There is no evidence that the lease was renewed during 1973-1977 or that any other overt act or continuing violation occurred, by virtue of the lease, to distinguish the Gatlinburg case from the two cases where the figures had been purchased. Defendants have not interposed a statute of limitations defense to the allegation that the lease was an unlawful exercise of monopoly power, so this aspect of C.A. 77-1243 is left intact by today's ruling.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-01243

And Consolidated Case Nos. 82-2330,
82-2337, 83-1268, 83-1269, 83-1270

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

BEFORE: Tamm and Wald, Circuit Judges, and Henley *, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit

[Filed Apr. 12, 1984]

ORDER

On consideration of the petition for rehearing of Appellants, filed March 26, 1984, and of Appellants' motion for leave to file a supplemental memorandum, it is

ORDERED by the Court that the Clerk is directed to file Appellants' lodged supplemental memorandum and it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

FURTHER ORDERED by the Court that the petition for rehearing is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-01243

And Consolidated Case Nos. 82-2330,
82-2337, 83-1268, 83-1269, 83-1270

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Henley *, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit

[Filed Apr. 12, 1984]

ORDER

The Clerk is directed to file Appellants' lodged supplemental memorandum in support of the suggestion for rehearing *en banc*.

Appellants' suggestion for rehearing *en banc* and the supplemental memorandum in support thereof have been circulated to the full Court and no member has requested

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending

on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

> (A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(b) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28.

Section 4B of the Clayton Act, 15 U.S.C. § 15(b), provides:

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act be revived by this Act.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.